Supreme Court, U.S.
FILED

No. 061225 JUL 24 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

LAURA S. CUMMINGS,

PLAINTIFF/PETITIONER,

V.

EQUITABLE LIFE INSURANCE COMPANY

DEFENDANT/RESPONDENT.

On Petition for a Writ of Certiorari to the 10th Circuit Court of Appeals & Utah District Court.

PETITION FOR WRIT OF CERTIORARI

Laura Cummings
43 North 100 East
American Fork, Utah 84003
(801) 756-3906
Plaintiff/Petitioner

Fabian & Clendenin
215 South State Street, 12th Floor
Salt Lake City, Utah 84151
(801) 531-8900
Defendant/Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in finding "…On March 1, 2005, petitioner filed another motion for enlargement of time but did not wait for the court to rule on her motion. Page 2, paragraph 2, Order and Judgment "…She filed her response in opposition to Equitable's motion to confirm without waiting for the district court to rule on her motion for enlargement of time to file her response. Under these circumstances, the district court did not err by entering its ruling on the motion to confirm without mentioning her "pending" motion." Page 3-4, paragraph 3, Order and Judgment.

2. As a part of due process, my second question asks whether petitioner was entitled to have her distinct and separate pending motion for enlargement of time, to file under judicial review and receive clarification of tolling period of statutory provision, allowing motions to vacate and rehearing during the three month statutory period, to be heard and ruled upon prior to my case being dismissed with prejudice and closed?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered Judgment and Order dated April 25, 2006 (App. 28-34). This petition was initially post marked July 24, 2006. Jurisdiction rests under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS
Fourteenth Amendment
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS
9 U.S.C. § 10
Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 11
Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not Submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 12 Notice of motions to vacate or modify; service; stay of proceedings Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

1. In 1995 and 1996, petitioner filed employment discrimination and retaliation charges against respondent with the Utah Antidiscrimination and Labor Division.

2. Said charges were settled in November, 1997 with the parties' adoption of a settlement agreement, and a letter/addendum which contained an arbitration provision drafted by respondent.

3. In 2002, petitioner filed a complaint in the district court, alleging that respondent discriminated against her in breach of the settlement agreement and letter/addendum and in violation of State and Federal laws.

4. Respondent moved to dismiss or, in the alternative, stay all of petitioner's claims pending arbitration.

5. On January 21, 2003, the district court issued an Opinion and Order that: (1) dismissed petitioner's state claims with prejudice for failure to exhaust state administrative

remedies, (, uled that all of petitioner's federal claims should be arbitrated, and (3) stayed her federal claims pending arbitration.

6. On December 1, 2004, the arbitrator issued her award, ruling in favor of respondent on all of petitioner's claims she addressed while utilizing offsets of certain claims.

7. On or about December 3, 2004, respondent filed a motion to confirm the award in the District Court.

8. On December 9, 2004, petitioner filed a status update as ordered by the Court, advising that I was in the process of filing a motion for clarification on several issues.

9. On December 21, 2004, petitioner was advised by AAA to file a motion for clarification and submit for arbitrator.

10. On December 22, 2004, petitioner motioned the district court for additional time to respond to respondent's motion to confirm so as to allow time for a motion for clarification to be heard by the arbitrator prior to responding.

11. On January 5, 2005, petitioner's motion for enlargement was granted and petitioner was ordered to respond to motion to confirm within sixty days.

12. Petitioner filed motion for clarification as instructed by American Arbitration Association on January 21, 2005.

13. On January 27, 2005, the arbitrator denied petitioner's motion for clarification citing rule R-46 of the AAA's Commercial Arbitration Rules.

14. On February 3, 2005, petitioner motioned the arbitrator for reconsideration based upon the fact that I was not requesting modification but rather clarification and had followed AAA's instructions.

15. On February 18, 2005, the arbitrator declined to reconsider her decision not to give clarification or comment.

16. It was petitioner's understanding that three month statutory period to file under Title 9, U.S.C. tolled from date of final decision being February 18, 2005, leaving petitioner

three months to May 19, 2005 to file a motion to vacate. However, petitioner was not sure and was careful to file motion for enlargement of time on or before March 2, 2005, to protect and preserve my right to file under judicial review.

17. On March 1, 2005, petitioner filed a motion for enlargement of time to file motion under Title 9, Section 10, Same; vacation; grounds; rehearing Section 9, 10 & 11 under judicial review and requested clarification of tolling period to be safe.

18. As ordered by the Court under granting of motion for enlargement of time January 5, 2005, petitioner responded within 60 days by filing an opposition March 7, 2005, to respondent's motion to confirm by objecting to confirmation while citing petitioner's intent to file a motion under Title 9 U.S.C.

19. On March 10, 2005, rather than grant or deny motion for enlargement of time to file under judicial review or

clarify tolling period, district court confirmed award and closed case.

20. On March 14, 2005, district court entered judgment.

21. Petitioner filed notice of appeal April 11, 2005.

22. Petitioner encountered a surgery and lost her father who passed away during time brief's were to be prepared and was successful in obtaining enlargements of time. Having never filed an appeal, petitioner filed an A-12 brief on or about November 3, 2005.

23. Respondent's brief was filed on or about December 6, 2005. Petitioner received brief a substantial time thereafter locating documents under bridge at my residence rather than receiving them in my mail box.

24. While petitioner disagreed with many of respondent's assertions there was insufficient time to file a reply brief.

25. On April 25, 2005, United States Court of Appeal filed Judgment and Order stating "...On March 1, 2005, petitioner filed another motion for enlargement of time but did not wait for the court to rule on her motion. Pg. 2, para. 2, Order and Judgment "...She filed her response in opposition to Equitable's motion to confirm without waiting for the district court to rule on her motion for enlargement of time to file her response.

26. Under these circumstances, the district court did not err by entering its ruling on the motion to confirm without mentioning her "pending" motion." Pg. 3-4, para. 3, Order and Judgment.

ARGUMENTS

I. UPON ISSUANCE OF ARBITRATOR'S AWARD, PETITIONER WAS CAREFUL TO PRESERVE RIGHTS IN ACCORDANCE WITH GUIDELINES SET FORTH UNDER FEDERAL ARBITRATION ACT

This Supreme Court affirmed under *W.R. Grace and Co. v. Local Union No 759,* Intern. *Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, C.A.5 (Miss.) 1981 652 F2d. 1248, *rehearing denied* 659 F.2d 1076, ***certiorari granted*** 102 S.Ct. 3481, 458. U.S. 1105, 73 L.Ed.2d 1365, affirmed 103 S.Ct. 2177, 461 U.S. 757, 76 L.Ed.2d 298. Justices affirmed that under certain circumstances one is entitled to a second arbitration which is what petitioner has been seeking. In this case, petitioner originally desired issues of discrimination be decided by a jury of my peers in a competent experienced district court, however despite the vague and ambiguous arbitration clause drafted by respondent, I was forced to arbitrate all issues based upon

respondent's argument to the District Court that the Federal Arbitration Act favors any questions of arbitral issues be decided in favor of arbitration, rather than the court ruling that any ambiguity in arbitration clause goes against drafter. One can only imagine the frustration I experienced in witnessing the arbitrator, who reportedly clerked for the 10th Circuit Court of Appeals in Denver, Colorado, depart from the pending arbitration hearing with respondent's counsel stepping into the elevator together. Later learning that the arbitrator completely ignored petitioner's valid objections regarding respondent being allowed to submit discovery and exhibits less than 24 hours prior to hearing in violation of American Arbitration Association's rules. Many of those documents had been requested for months under discovery requests. It was unbelievable to witness utilization of these same unverified and unsupported documents containing erroneous figures be addressed in arbitrator's award to issue offsets resulting in respondent prevailing on all claims

arbitrator chose to address, while other issues presented for judgment in spite of CEO's own admission at hearing "we screwed up" and volumes of direct evidence under exhibits presented at hearing conflicting with award. I have not argued basis supporting motion to vacate or rehearing for it was not ripe to be heard according to clerk of the Court of Appeals who advised that an appeal is to address issues raised at lower court. Upon receipt of arbitrator's award, I began pursuing clarification, however, AAA's rules did not address any such motion. Respondent acknowledged written notice of petitioner's desire for clarification of several of arbitrator's findings contained in award as early as December 9, 2004.

I received direction from AAA on December 21, 2004 to prepare my motion and submit it through AAA and then immediately motioned district court for an extension of time to respond to respondent's December 3, 2004, motion to confirm allowing time for clarification to be heard. I was seeking enough information to enable me in making an

informed decision. Where ambiguous findings were present in arbitrator's award, petitioner's motion for clarification was proper *Douglas Aircraft Company v. N.L.R.B., C.A. 9* 1979, 609 F.2d 352. While I understand that under most circumstances an arbitrator is not required to give explanation for their rulings, in this matter the arbitrator issued an award absent inclusion of all issues presented for judgment while using ambiguous and erroneous calculations.

II. COURT OF APPEALS ERRED IN DETERMINING "...SHE RESPONDED IN OPPOSITION TO EQUITABLE'S MOTION TO CONFIRM WITHOUT WAITING FOR THE DISTRICT COURT TO RULE ON HER MOTION FOR ENLARGEMENT TO FILE HER RESPONSE."

On January 5, 2005, district court granted petitioner's motion for enlargement of time to respond to respondent's motion to confirm so as to allow time for motion for clarification to be heard. District Court ordered petitioner to respond to motion to confirm on or before March 7, 2005 (60 days landing on weekend pushing to following Monday). Upon receiving district court's extension of time, motion for

clarification was then filed January 21, 2005. On January 27, 2005, arbitrator denied motion for clarification referencing AAA's Commercial Rule R-46 but did not address a motion for clarification. Oddly arbitrator who allowed respondent to produce exhibits, discovery and other matters less than 24 hours prior to hearing in violation of AAA's rules and over petitioner's objections with no consequences now attempts to hold petitioner to the line but cites a non applicable rule to do so. Upon motioning for reconsideration February 3, 2005, explaining that R-46 was not applicable and that respondent received notice nine days after issuance of arbitration award the arbitrator declined to reconsider her decision or make comment on February 18, 2005.

After having not received information petitioner was seeking, I determined it best to pursue judicial review on March 1, 2005, filing a motion for enlargement of time to file under judicial review and requesting district court to clarify tolling of statutory time period which petitioner believes

tolled to date of arbitrator's final decision February 18, 2005. *Warren v. Tacher*, W.D.Ky. 2000, 114 F. Supp.2d 600., where 90 day statute of limitations on applications to vacate arbitration awards accrued on date arbitrator denied request to modify award rather than on date of award... In complying with district court's Order dated January 5, 2005, petitioner filed my objection in response to respondent's motion to confirm award, on March 7, 2005. I did not request any additional time to respond. Court of Appeals erred in the assumption that I responded prior to waiting for motion to be heard. The first motion for enlargement of time to respond had already been heard and granted. The second motion for enlargement of time to file under judicial review and clarify tolling period was a distinct and separate motion.

III. DISTRICT COURT ERRED IN CONFIRMING AWARD AND DISMISSING PETITIONERS CASE PRIOR TO RULING ON MOTION FOR ENLARGEMENT OF TIME TO FILE UNDER JUDICIAL REVIEW

In both my motion for enlargement of time to file under judicial review timely filed March 1, 2005, and my response in opposition to motion to confirm filed March 7, 2005, the parties clearly received further notice of my objection to motion to confirm and also timely advised the Court and opposing party of my desire and pursuit of judicial review. Under *Paley Associates, Inc. v. Universal Woolens, Inc.*, S.D.N.Y. 1978, 446 F. Supp. 212 it was held that having registered its objection to confirmation of arbitration award, party preserved its right to move later to vacate confirmation if it had any worthy grounds to do so… Petitioner's response in opposition to motion to confirm filed March 7, 2005 objected to confirmation while raising issues concerning malice disregard of the law, violations of public policy, unfair

hearing, and certain rulings palpably faulty, citing 90 days to file under Title 9 U.S.C. Section 10: Same; vacation; grounds; rehearing and asked District Court to "...allow plaintiff an opportunity to complete the filing of her motion under judicial review."

After having been required to borrow more than $10,000.00 to cover costs for filing fees, and arbitration costs, much of which I would not have had to expend under our district court system. It's ironic that I was forced to expend said costs to maintain right in seeking justice concerning matters which involved years of suppression of income and benefit issues of which the arbitrator selectively ruled upon. That on February 28, 2005, I requested any information the AAA could forward to assist with judicial review and inspite of the expensive costs I paid them, they elected to ignore my request.

On April 21, 2005, I requested American Arbitration Association to forward my file to the 10th Circuit Court. AAA

also ignored this request. Again on June 17, 2005, I requested docketing of my file to be forwarded to 10th Circuit Court and to forward me a bill . AAA ignored each and every request and violated AAA's Rule R-47 which states "The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration. As far as I am concerned, the arbitration process only served to further take advantage of the situation again with no accountability.

Under *Warren v. Tacher,* W.D.Ky. 2000, 114 F. Supp.2d 600., 90 - day statute of limitations on applications to vacate arbitration awards accrued on date arbitrator denied request to modify award rather than on date of award. In this instance, the arbitrator denied to reconsider motion for clarification on February 18, 2005, leaving petitioner until May 18, 2005, to file motion to vacate, rehearing etc.. Petitioner filed motion for enlargement with request for clarification to be sure I

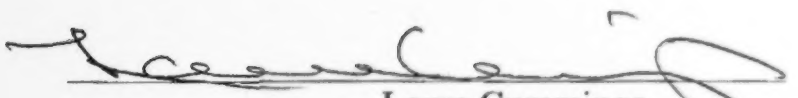
remained in compliance with three month statute. Paragraph 1 of my motion for enlargement filed March 1, 2005, clearly states "...Plaintiff seeks an order to allow her 90 days from Arbitrator's final decision dated February 18, 2005, to file a motion involving judicial review". That is the exact time frame petitioner interprets the above case law supports three month statute allows. Petitioner was exercising right and seeking nothing more than what she believes Federal Arbitration Act allows.

Under *Hartbridge,* C.C.A.2 (NY) 1932, 57 F.2d 672, held that the Court erred in confirming arbitrators' award as of course after being advised that objections, which could not be presented because of missing exhibits used by arbitrator, were to be made, though materiality of such exhibits did not appear. In this instance petitioner has been unable to secure copies of files from American Arbitration Association altogether.

Now after having been careful to give all parties timely notice of my intent to exercise the very rights this court

determined exists, my case was closed March 14, 2005. My case was closed prior to my motion for enlargement to file under judicial review and request for clarification concerning tolling of time period was being ruled upon. It is my sincere desire that this court shall affirm, that as a right to due process, all motions shall be heard and decided before cases are dismissed with prejudice and closed.

Respectfully submitted,



Laura Cummings
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FILED
IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH
MARCH 10 2005
MAEKUS B. ZIMMER, CLERK
BY_____
DEPUTY CLERK

IN THE UNITED STATES COURT FOR THE DISTRICT

OF UTAH CENTRAL DIVISION

LAURA S. CUMMINGS,

Plaintiff,

ORDER CONFIRMING ARBITRATION AWARD

Case No. 2:02-CV-00444 PGC

VS.

EQUITABLE LIFE & CASUALTY INSURANCE COMPANY, INC., a Utah Corporation; JOHN DOES 1-10,

Defendants.

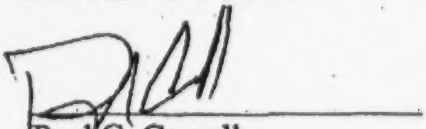
This matter is before the court on defendants' motion to confirm the arbitration award entered on December 1, 2004. As required by the Federal Arbitration Act, an arbitration award may be confirmed by a U.S. district court in certain circumstances[1] The prerequisites to enforcement of an arbitration award under this section have been satisfied in the instant case. While the motion was timely filed back on December 3, 2004, the court granted plaintiff's request for additional time (60 days) to respond to the motion t o confirm. Plaintiff's basis for her request was that she was preparing to submit to the arbitrator a motion for clarification of the decision. On January 27, 2005, plaintiff's motion for clarification was denied as untimely pursuant to certain arbitration rules. The plaintiff notified the court of the arbitrator's decision on March 4, 2005. Furthermore, on March 7, 2005, plaintiff filed her response in opposition to the defendant's motion to confirm the arbitration award. Having

[1] 9 U.S.C. 9.

reviewed plaintiffs response, and for good cause appearing, the court hereby ORDERS that the Award of Arbitrator be confirmed as a judgment by the court, granting judgment in favor of defendants on each of plaintiffs claims and dismissing each claim with prejudice. The clerk of the court is directed to close the case.

DATED this 9th day of March, 2005.

BY THE COURT:



Paul G. Cassell
United States District Judge

U.S. DISTRICT COURT
2005 MAR 14 P 5:00
DISTRICT OF UTAH
BY_____
DEPUTY CLERK

United States District Court

Central Division for the District of Utah

Laura S. Cummings

JUDGMENT IN A CIVIL CASE

V.

Equitable Life & Casualty Insurance Co. et al

Case Number: 2:02cv444PGC

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the defendants and plaintiff's cause of action is dismissed with prejudice.

March 14, 2005 — Markus B. Zimmer
Date — *Clerk*
Entered on docket
3-15-05 by: s/Louisa M
s/ ROA

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

LAURA S. CUMMINGS
Plaintiff

AMENDED ORDER CONFIRMING ARBITRATION AWARD

VS.

Case No. 2:02-CV-00444 PGC

EQUTABLE LIFE & CASUALTY INSURANCE COMPANY, INC., A Utah Corporation; JOHN DOES 1-10
Defendants.

Upon receipt of the Tenth Circuit's opinion in *Cummings v. Equitable Life & Casualty Insurance Company,* No. 05-4085, the court hereby amends its previous order confirming an arbitration award in favor of plaintiff Laura S. Cummings' employer, Equitable Life & Casualty Company, Inc. The court ORDERS that the Award of Arbitrator be confirmed as a judgment by the

court, granting judgment in favor of defendants on each of plaintiff's claims. All of Ms. Cummings' federal claims which were arbitrated and stayed pending arbitration are confirmed, and each of these federal claims is dismissed with prejudice. Ms. Cummings' state claims, which the court previously dismissed with prejudice for failure to exhaust state administrative remedies, are ORDERED dismissed without prejudice pursuant to *Fitzgeral v. Correctional Corporation of Americal*' The court's order is amended to reflect that its dismissal of Ms. Cummings' state claims is without

prejudice. The case is to remain closed.

DATED this 25th day of May, 2006.

BY THE COURT:

s/ Paul G.Cassell

Paul G. Cassell, United States District Judge

403 F.3d 1134, 1139 (10th Cir. 2005) ("[A] dismissal based on lack of exhaustion should ordinarly be without prejudice.")

FILED
United States Court of Appeals
Tenth Circuit
April 25, 2006
Elisabeth A. Shumaker
Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LAURA S. CUMMINGS,

Plaintiff-Appellant,

v.

No. 05-4085
(D.C. No. 2:02-CV-444-C)
(D. Utah)

EQUITABLE LIFE & CASUALTY INSURANCE COMPANY, a Utah Corporation,

Defendant-Appellee.

ORDER AND JUDGMENT

Before **KELLY, BRISCOE, and LUCERO,** Circuit Judges.

Plaintiff-appellant Laura S. Cummings, appearing pro se, appeals from the district court's March 10, 2005 order confirming an arbitration award in favor of her employer, defendant Equitable Life and Casualty Insurance Company (Equitable). We have jurisdiction under 28 U.S.C. § 1291.

In 1995 and 1996, appellant filed employment discrimination and retaliation charges against Equitable with the Utah Antidiscrimination and Labor Division. Those charges were settled in November 1997 with the parties' adoption of a settlement agreement, and a letter/addendum which contained an arbitration provision. In 2002, appellant filed a complaint in the district court, alleging that Equitable discriminated

against her in breach of the settlement agreement and letter/addendum and in violation of state and federal law. Equitable moved to dismiss or, in the alternative, stay all of appellant's claims pending arbitration. On January 21, 2003, the district court issued an Opinion and Order that: (1) dismissed appellant's state claims with prejudice for failure to exhaust state administrative remedies, (2) ruled that all of plaintiff's federal claims should be arbitrated, and (3) stayed her federal claims pending arbitration.

On December 1, 2004, the arbitrator issued her award, ruling in favor of Equitable on all of appellant's claims. Equitable filed a motion to confirm the award in the district court on December 3, 2004. Appellant sought additional time to respond and, on January 5, 2005, was granted sixty days more. On March 1, 2005, appellant

filed another motion for enlargement of time but did not wait for the court to rule on her motion. Rather, on March 7, 2005, appellant filed her response in opposition to the motion to confirm. On March 10, 2005, the district court confirmed the arbitration award.

Appellant argues that: (1) the district court held that all of her claims should be arbitrated, and so the dismissal of her state claims should be reversed so that those claims can be arbitrated; and (2) the confirmation of the arbitration award should be reversed because the district court did not address her pending motion for enlargement of time.

Appellant first argument is without merit. The district court did not hold that her state claims should be arbitrated; the court held that they should be dismissed for appelant's failure to exhaust exhaust state

administrative remedies, as required by Utah law. Aplee. Supp. App. at 107. Under Utah law, appellant's failure to obtain a final state administrative decision barred judicial review. See Maverik Country Stores, Inc. v. Indus. Comm'n of Utah, 860 P.2d 944, 947-48 (Utah Ct. App. 1993) (discussing jurisdictional requirement of exhaustion of administrative remedies under Utah Anti-Discrimination Act and Utah Administrative Procedures Act). We note, however, that "a dismissal based on lack of exhaustion should ordinarily be **without** prejudice." Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1139 (10th Cir. 2005). Therefore, we vacate and remand for this limited purpose: for the district court to modify its Opinion and Order and its Judgment to reflect that its dismissal of appellant's state claims is without prejudice. Appellant's second argument is also without merit. She

filed her response in opposition to Equitable's motion to confirm without waiting for the district court to rule on her motion for enlargement of time to file her response. Under these circumstances, the district court did not err by entering its ruling on the motion to confirm without mentioning her "pending" motion.

We AFFIRM the district court's dismissal of appellant's state claims and VACATE only the court's references to the dismissal being with prejudice. We REMAND only for the district court to amend its judgment to dismiss the state claims without prejudice.

We AFFIRM the district court's rulings in all other regards.

Entered for the Court

s/Unsigned

Mary Beck Briscoe
Circuit Judge

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re: 77 116 00035 04 DECR

Laura S. Cummings

and

Equitable Life & Casualty

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated December 18, 2003, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, AWARD, as follows:

FACTUAL BACKGROUND

Laura Cummings has been employed by Equitable Life & Casualty Insurance Company ("Equitable") since 1979. In 1995 and 1996, Ms. Cummings filed various

charges against Equitable with the Utah Antidiscrimination and Labor Division. Thereafter, these charges and other issues between the parties were resolved by way of a Settlement Agreement and Addendum dated November 25, 1997 (the "Settlement Agreement").

In this arbitration, Ms. Cummings alleges that Equitable breached the Settlement Agreement in several respects (as further detailed below), that Equitable discriminated against her on the basis of disability and gender, and that Equitable retaliated against her for her claims of discrimination.

BREACH OF CONTRACT

Laura Cummings' Claim

Ms. Cummings claims that Equitable breached the Settlement Agreement in the following ways:

1) by failing to provide a two-year program to improve her business management skills, as required in paragraph 1;

2) by failing to provide her opportunities for advancement, as required in paragraph 2;

3) by modifying, limiting and reducing her opportunities, rights and benefits as an employee of

Equitable, in violation of paragraph 6;

4) by failing to base her 401K contributions on her November 1, 1997 salary increase and subsequent increases, as required in paragraph 7;

5) by failing to keep the terms of the Settlement Agreement confidential, as required in paragraph 14;

6) by failing to pay her a monthly salary of $4,166.67 (and/or an annual salary of $50,000), from November 1, 1997 through November 1, 2002, as required in paragraphs 3, 4 and 5;

7) by failing to give her "intern" (sic) (meaning "interim") raises and regularly scheduled annual reviews, as required in paragraph 3;

8) by failing to arbitrate disputes, as provided in the Addendum; and

9) by breaching the implied and explicit covenant of good faith and fair dealing.

During the first several months of the supplemental pay under the Settlement Agreement, Equitable inadvertently overpaid Ms. Cummings. Ms. Cummings alleges that when Equitable discovered its mistake, it agreed "to call the overpayment square" and "meet and work out a reasonable solution." Ms. Cummings claims Equitable breached this

subsequent agreement by deducting sums from her pay until the overpayments had been reimbursed to Equitable.

Equitable's Defense

Equitable denies that it breached the Agreement, asserts that it dealt fairly with Ms. Cummings, and further asserts that Ms. Cummings cannot prove damages. Equitable denies that it agreed to allow Ms. Cummings to keep the funds it overpaid her.

Arbitrator's Ruling

With regard to the alleged breach of the Settlement Agreement, I hold as follows. (The corresponding numbers correspond to the numbers above.)

1) Equitable met its contractual obligation to provide the two-year mentoring program to Ms. Cummings when it provided training and mentoring through Jill Johnson & Associates. Ms. Cummings decided to terminate the program for her own reasons. Ms. Cummings contends

that she was forced to terminate the program due to Equitable's interference in the relationship between her and her mentor and her subsequent loss of confidence and trust in the mentor. However, I do not find Ms. Cummings' termination of the program to be reasonable or necessary under the circumstances, and I find that Ms. Cummings' termination of the program was not caused by Equitable. Paragraph 10 of the Settlement Agreement relieves Equitable of any further obligation to provide this program to her, once Ms. Cummings elected not to proceed.

2) Equitable met its contractual obligation to provide opportunities for advancement, as modified by the Addendum to the Settlement Agreement, which provides that Equitable makes "no promises of any particular type of advancement." Ms. Cummings contends that Equitable failed to promote her to a position in human resources and failed to promote her to Underwriter sooner. However, there was insufficient evidence to prove that Ms. Cummings was qualified for or entitled to any promotion that she did not receive. Moreover, Ms. Cummings was promoted to the position of Underwriter. Although this promotion did not occur as quickly as she desired, her advancement was hampered mostly by her unfortunate automobile accident,

which caused her to miss several months of work and then to work only part-time for a substantial length of time thereafter. The evidence was insufficient to show that Equitable held Ms. Cummings back. She was provided opportunities for advancement, as required by the Settlement Agreement.

3) There was insufficient evidence that Equitable modified, limited or reduced Ms. Cummings' opportunities, rights and benefits as an employee of Equitable. Ms. Cummings claims that she was shorted vacation and sick leave, yet she did not establish how much she was shorted and the value of the hours she was shorted. On cross-examination, Ms. Cummings admitted that the calculations she had previously done were incorrect. Moreover, even if Ms. Cummings was shorted vacation and sick day pay, it was more than made up by the extra amounts Equitable paid her and the extra year of supplemental pay it gave her.

4) Ms. Cummings' 401K contributions were to be "based upon her November 1, 1997 salary increase and any subsequent increases." Settlement Agreement, ¶7. Although it does appear that the 401K contributions varied throughout

the period of the Settlement Agreement, there was insufficient evidence that Equitable contributed the wrong amount. Equitable presented evidence that the 401K contribution was an amount elected by the employee and that Ms. Cummings set the contribution amount that was deducted from her pay. Ms. Cummings did not rebut this evidence. Moreover, even if Equitable had contributed the wrong amount, the contributions were from Ms. Cummings pay. Amounts not contributed were paid to Ms. Cummings in her paycheck, resulting in no actual loss of the funds. Although there was some mention of employer matching of contributions, it was unclear when this was in effect or whether Ms. Cummings lost any matching contributions as a result. The evidence was insufficient to establish any amounts Ms. Cummings may have lost.

5) There was insufficient evidence that Equitable breached the confidentiality term of the Settlement Agreement. Mr. Hoffman testified that he was only shown the portion of the Agreement that was necessary for him to process payroll. Moreover, Ms. Cummings did not present evidence of any damage caused by any alleged confidentiality breach.

6) As to the supplemental pay, I disagree with Ms. Cummings' contentions that Equitable was required to pay her $50,000 per year regardless of the number of hours per week she worked and that the $50,000 per year salary was to be based on 80 hours of work per pay period. These contentions contradict the terms of the final written Agreement. The Addendum states that in the event Ms. Cummings does not work "on a forty-hour per week basis" both her "normal salary and the supplemented salary will be decreased on a pro rata basis using a forty-hour per week bench mark." Although Ms. Cummings testified that the parties discussed something different in the negotiations leading up to the signing of the Settlement Agreement, it is the final written Settlement Agreement that controls. Equitable paid Ms. Cummings according to the terms of the final written Agreement. Equitable's records showed that during the five-year term of the Settlement Agreement, it paid Ms. Cummings $160,534.26, although the Settlement Agreement required that she be paid $154,004.33. *See* Exhibit DD (amount excluding the year 2003). In addition, Equitable actually *extended* the supplemental pay for a full year beyond the five-year term. This resulted in additional

pay to Ms. Cummings in the amount of nearly *$35,000. See* Exhibit DD.

Ms. Cummings claims that she lost a mortgage at a favorable interest rate due to Equitable's fluctuations in the payment of her supplemental pay. The documentation and other evidence Ms. Cummings submitted was wholly inadequate to establish this item of alleged damages. Among other things, she failed to prove that she could have obtained the more favorable interest rate but for Equitable's actions and failed to adequately prove the amount of her alleged losses with reasonable certainty.

7) Ms. Cummings did not establish that Equitable deprived her of raises and bonuses, either during the term of the Agreement or thereafter. Her employment history shows that she received regular raises. *See* Exhibit BB. At the beginning of the term of the Agreement, she was earning $11.46 per hour as an Assistant Secretary. By the end of the term of the Agreement, she was earning $15.42 per hour as an Underwriter. No evidence was presented of any bonus she was entitled to and was not paid.

8) Equitable did not refuse to arbitrate disputes.

Equitable was not obligated to initiate arbitration each time Ms. Cummings and Equitable disagreed. If Ms. Cummings believed that there was an issue to be arbitrated, she was free to initiate arbitration at any time. When she did initiate this action, Equitable did not refuse to participate.

9) Equitable did not fail to deal fairly and/or in good faith with Ms. Cummings. Although there were some glitches in the payment of her supplemental pay and some other mistakes made by Mr. Hoffman, these problems were largely due to the fact that such pay was irregular and was not easily handled by the payroll system. In addition, Mr. Hoffman was battling a serious illness at the time. It did not appear that any of the mistakes Equitable made were intentional. Additionally, Equitable extended Ms. Cummings' supplemental pay for an additional year. Such generosity is inconsistent with bad faith.

As to the statement by Mr. Hoffman that Equitable would "call it even" with regard to the overpayments of the supplemental pay, I find that this statement lacked consideration and that it is therefore unenforceable against Equitable. Even if the statement had been enforceable, the amounts Ms. Cummings paid back

would have to be offset against the extra year of supplemental pay she received.

DISABILITY
DISCRIMINATION/FAILURE TO
ACCOMMODATE DISABILITY
Laura Cummings' Claim

Ms. Cummings claims she was disabled, within the meaning of the Americans with Disabilities Act ("ADA"), as of February 1999, when she was injured in an automobile accident. She claims that Equitable failed to provide reasonable accommodation of her disability, in the form of ergonomic changes to her work station, and further discriminated against her by reassigning her to clerical duties and suspending her from her Associate Underwriter position upon her return to work in September 1999, and by failing to allow her to regain her position as Associate Underwriter when she applied in January 2000. She claims that her advancement opportunities were adversely affected. Ms. Cummings also claims that Equitable delayed providing her copies of its policies and procedures and the necessary paperwork for her disability benefits.

Equitable's Defense

Equitable asserts that Ms. Cummings is not disabled under the ADA, that she was not qualified to perform the job she sought because it was a full-time job and she could not work full-time. Equitable contends that Ms. Cummings was not treated less favorably than other employees on the basis of her claimed disability, and that Equitable accommodated Ms. Cummings claimed disability. It claims that all actions it took involving Ms. Cummings were for legitimate business reasons unrelated to her disability.

Arbitrator's Ruling

It is questionable whether Ms. Cummings was disabled, within the ADA definition, when she returned to work at Equitable. However, I need not reach this issue because, even if she was disabled under the ADA, Equitable provided reasonable accommodation of her impairment. It allowed her to work part-time for a substantial length of time, even though her position required full-time work, and it made ergonomic changes to her workstation. Although Ms. Cummings contends that Equitable did not make the ergonomic changes as quickly as it should have, the delay

appears to be at least partially caused by her failure to provide certain information Equitable requested. Moreover, Ms. Cummings presented no evidence of any loss resulting from the delay. The evidence did not support Ms. Cummings' contention that Equitable reassigned her to clerical duties or suspended her from her Associate Underwriter position upon her return to work. To the contrary, Equitable's witnesses and records showed that she regained her Associate Underwriter position upon her return. If Ms. Cummings' advancement was delayed, it was due to her extended medical leave and inability to work full-time. Although Ms. Cummings claims that Equitable delayed providing her copies of its policies and procedures and the necessary paperwork for her disability benefits, she did not show any loss of benefits resulting from this delay.

GENDER DISCRIMINATION

Laura Cummings' Claim

Ms. Cummings claims she was discriminated against on the basis of her gender in that Equitable gave her position as Associate Underwriter to a less qualified male employee while she was on medical leave and then refused to give the position back to her, even after the male

employee left. She further claims that male employees received preferential treatment and benefits not afforded to female employees.

Equitable's Defense

Equitable claims that Ms. Cummings failed to apply for the position she claims went to a male employee. It claims that all actions it took involving Ms. Cummings were for legitimate business reasons unrelated to her gender.

Arbitrator's Ruling

Equitable did not discriminate against Ms. Cummings on the basis of gender. Contrary to Ms. Cummings' contention, she remained an Associate Underwriter upon her return from medical leave. There was insufficient evidence of any preferential treatment or benefit given to male employees over female employees.

RETALIATION

Laura Cummings' Claim

Ms. Cummings claims that Equitable retaliated against her in the following ways after she filed a charge of discrimination in May 2000: 1) by charging her fees for 401K loans that others were not charged; 2) by charging her a higher rate of interest than others on her 401K loans; 3) by making her pay for health insurance coverage under COBRA, which she did not owe; 4) by disclosing confidential information concerning her to Mr. Surfass; and 5) by Mr. Ross and Mr. Hoffman "interrogating" her for three hours in a confrontational and intimidating way concerning her disputes with Equitable.

Equitable's Defense

Equitable claims that all actions it took involving Ms. Cummings were for legitimate business reasons unrelated to her protected activity.

Arbitrator's Ruling

Ms. Cummings was charged the same fees and interest rates as anyone else in her position would have been charged. Moreover, the fees were charged by American National, the

company that administered the 401K plan, not Equitable. The interest rates were set by averaging the interest rates charged at three banking institutions and were the same for every Equitable employee. Ms. Cummings became ineligible for health insurance benefits under Equitable's policy; therefore, the COBRA charges were appropriate. Mr. Surfass is Equitable's legal counsel, and Ms. Cummings is an Equitable employee; it is therefore not inappropriate for Equitable to discuss issues concerning Ms. Cummings with Mr. Surfass. Mr. Ross, Equitable's President, and Mr. Hoffman, Equitable's then Human Resources Director attempted to resolve the issues between Equitable and Ms. Cummings by discussing them with her. Ms. Cummings presented a tape recording of a few minutes of this meeting, made without Mr. Ross's or Mr. Hoffman's knowledge or permission. Neither Mr. Ross nor Mr. Hoffman were confrontational or intimidating and seemed genuinely interested in resolving the dispute. I find there is no evidence of retaliation.

DAMAGES

Ms. Cummings seeks monetary damages, punitive damages, injunctive relief and reimbursement of the fees and costs she has incurred in this arbitration. Ms. Cummings has

not prevailed in this arbitration and is therefore not entitled to recover damages or other relief.

EQUITABLE'S REQUEST FOR ATTORNEY FEES AND COSTS

Equitable requests an award of attorney fees and costs based on the Settlement Agreement provision that states that Equitable would reimburse Ms. Cummings for any reasonable cost and attorney fees she may incur if she prevails in the arbitration. Utah Code Ann. § 78-27-56.5 provides that if a contract allows one party to recover fees, a court may award fees to either party that prevails in an action based on the contract.

I decline to award Equitable its attorney fees and costs even though it has prevailed in this arbitration. This arbitration involved claims of discrimination and retaliation in addition to the breach of contract claim. Fees and costs are not typically awarded to defendants who prevail in such cases, as such awards would have the effect of chilling the exercise of important rights under federal and state anti-discrimination statutes.

VIII. ARBITRATION FEES AND COSTS

The administrative fees and expenses of the American Arbitration Association ("the Association") totaling FOUR THOUSAND DOLLARS AND ZERO CENTS, ($4,000.00) shall be borne equally by the parties, and the compensation and expenses of the arbitrator totaling ELEVEN THOUSAND SIX HUNDRED TEN DOLLARS AND EIGHT CENTS, ($11,610.08) shall be borne equally by the parties. Each party shall pay to the Association the sum of NINE HUNDRED THIRTY TWO DOLLARS AND FIFTY-FOUR CENTS ($932.54) representing amounts still due the Association. These amounts reflect all payments made to date.

This Award is in full settlement of all claims and counterclaims submitted to this arbitration.

DATED this 1st, of December, 2004

BY:

Theresa L. Corrada

Theresa L. Corrada

Denise Crow

From: Theresa Corrada
Sent To: [TCorrada@irwl.com] Friday, February 18, 2005 7:49 AM Denise Crow

Subject: Cummings/Equitable

In response to Mr. Cummings' letter dated February 3, 2005, I decline to reconsider my previous order denying Claimant's Motion for Clarification.

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e-mail and any attachments are believed to be free of any virus or other defect. that might negatively affect any computer system into which it is received and opened it is the responsibility of the recipient to ensure that it is virus-free and no responsibility is accepted by the sender for any loss or damage arising in any way in the event that such a virus or defect exists. Thank you for your cooperation.